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Supreme Court, U.S.
FILED

No. 08- 08-247 JUN 23 2008

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IN THE

Supreme Court of the United States

DAVID JAMES YARBROUGH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A) Whether the United States Court of Appeals for the Tenth Circuit in the instant case of *United States v. David James Yarbrough* misconstrued the rules of law established by this Court regarding when the Constitution requires that a new trial be granted to a criminal defendant when the government has used false evidence to obtain his conviction, and decided an important question of federal law in a manner that conflicts with the Supreme Court's decisions in *United States v. Agurs*, 427 U.S. 97, 96 S. Ct. 2392 (1976); *Napue v. Illinois*, 360 U.S. 264 (1959); and *Miller v. Pate*, 386 U.S. 1 (1967).

B) Whether the United States Court of Appeals for the Tenth Circuit in the instant case of *United States v. David James Yarbrough* misconstrued the rules of law established by this Court regarding when the Constitution requires that a new trial be granted to a criminal defendant when the government has failed to disclose evidence favorable to the defense including evidence relating to the government's use of false evidence to obtain his conviction, and decided an important question of federal law in a manner that conflicts with the Supreme Court's decisions in *Kyles v. Whitley*, 514 U.S. 419 (1995).

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CITATIONS OF THE OPINIONS AND ORDERS ENTERED IN THE CASE

The decision by the United States Court of Appeals for the Tenth Circuit entered below is reported at *United States v. David James Yarbrough*, 261 Fed. Appx. 80 (10th Cir. 2008). Rehearing was denied by Order dated march 25, 2008.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Tenth Circuit issued its opinion affirming the District Court's decision on January 14, 2008. Rehearing was denied by Order dated March 25, 2008. The Petitioner filed this Petition within 90 days of March 25, 2008 via commercial carrier for delivery to the Court within three days.

28 U.S.C. § 1254(1) is the statutory provision which confers on this Court jurisdiction to review on a W*rit of Certiorari* the judgment and orders of the United States Court of Appeals for the Tenth Circuit in question in this case.

No special notifications pursuant to Rule 29.4(b) or (c) are required.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS INVOLVED

Amendment V

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution.

STATEMENT OF THE CASE

Mr. Yarbrough was indicted via a superceding indictment that alleged in eight different counts that Mr. Yarbrough, an Army manager in charge of air monitoring for chemical warfare agent (agent monitoring) at the Army's CAMDS chemical weapons test facility near Tooele, Utah, had knowingly made false statements in violation of 18 U.S.C. § 1001. Apl. App. at 14.

Mr. Yarbrough, who asserted his innocence, was tried before a jury on July 28-30, 2003. The jury verdict of guilty on seven of eight counts was issued July 30, 2003. Apl. App. at 21. Mr. Yarbrough's defense was that he had not knowingly recorded false data on his worksheets and had not knowingly submitted false data to federal agencies. Mr. Yarbrough asserted that the applicable Army procedures for the recertification baselines in question allowed use of any non-first-challenge data he had used. Apl. App. at 1325-29, 1331-41, 1428-31, 1433, 1439.

The prosecuting attorneys argued, and other Army employees testified, that only the first challenge of the day was permissible under Army procedure. Apl. App. at 998-99, 1416, 1441, 1253, 1255. A post-trial proceeding was held shortly after trial on Defendant Yarbrough's initial motion for new trial based on newly discovered evidence available at that time. In that hearing, an Army manager admitted that her testimony at trial had been false that there was a more recent Army procedure (LQAP) in place than the one Mr. Yarbrough relied on. This manager admitted post-trial that the LQAP relied on by Mr. Yarbrough at trial was in fact the correct LQAP. Apl. App. at 1453-60.

The District Court denied relief on Defendant Yarbrough's initial motion for new trial and Mr. Yarbrough appealed. On appeal, the Tenth Circuit, although finding that the Government had not established that any Army procedure existed that required use of first challenge results, accepted the argument by the Government that Mr. Yarbrough had not acted consistent with his asserted defense because

his worksheet data numbers could not all be found somewhere on the logs. *United States v. David James Yarbrough*, Order and Judgment at p.12 (10th Cir. June 28, 2005).

Several months after trial, Mr. Yarbrough obtained new documentary evidence from the Army via efforts of his new counsel, including documents not produced by the Government pre-trial or during trial. These documents, which included computer recorded data from the agent monitors in question (the "PDARS"), several strip charts which recorded the readings of the ACAMS monitors, and two monitoring data compilations prepared for the Army Commander post-trial, contained substantial evidence favorable to Mr. Yarbrough's defense. These new documents also evidenced the existence of additional favorable evidence that the Government had yet to produce. This newly discovered evidence supported the conclusion that the Government had knowingly obtained Mr. Yarbrough's conviction by use of false evidence at trial. This newly discovered evidence also allowed Mr. Yarbrough to explain the discrepancies between his worksheets and the ACAMS operators' logs.

Mr. Yarbrough brought this newly discovered evidence to the attention of the District Court in a second motion for new trial based on newly discovered evidence, and requested an evidentiary hearing. Apl. App. at 23, 26, 784, 792, 873. The District Court denied Mr. Yarbrough's new motion for new trial and also denied Mr. Yarbrough's request for discovery and an evidentiary hearing. Apl. App. at 872, 873, 905-06. Mr. Yarbrough timely appealed the District Court's

denial of his motions for new trial, discovery, and an evidentiary hearing. Apl. App. at 908.

In the prior appeal to this Court of Appeals, the Government argued that Mr. Yarbrough's asserted defense – that he acted in good faith in implementing the procedure he believed applied at the time – should not be believed because the monitoring data numbers on Mr. Yarbrough's worksheets in many cases did not match any first or later challenge result recorded in the operator logs.

The Court of Appeals, although finding that the Government had not established that any Army procedure (LQAP) existed that specifically required use of first challenge results, accepted the argument by the Government that Mr. Yarbrough had not acted consistent with his asserted defense because his worksheet data numbers could not be found on the logs. *United States v. David James Yarbrough*, Order and Judgment at p.12 (10th Cir. June 28, 2005).

Mr. Yarbrough, in his statement to CID agent Pavlik and at trial, explicitly disclaimed any involvement in altering operator logs. *See* Aplt. App. at 386, 1343. CID agent Pavlik testified that Pavlik was not even aware that operator logs had been altered. Aplt. App. at 1248. This trial testimony by Army CID Agent Pavlik was apparently simply false, because in manager Kevin Draper's subsequent deposition testimony Draper explicitly describes meetings in which Draper explained to Agent Pavlik the evidence of log falsifications found and testified that Pavlik seemed "pleased" that these log alterations could be proven. See Aplt. App. at 735-36.

Army monitoring manager Kevin Draper, who was tasked to investigate some aspects of the alleged use of false data in the 2002 CAMDS ACAMS baselines in question, testified in a post-trial deposition in Mr. Yarbrough's whistleblower employment case on January 10th and 11th, 2005 that he discovered before Mr. Yarbrough was indicted that the operator logs in question had been altered, *See* Aplt. App. at 569-99, 650-55, 659-60, 728-31, 734-37, 740-42, 747, and he reported his findings regarding falsified logs to Army officials, the Army CID agent (the Government's criminal investigator) and apparently to the prosecuting attorneys (Army counsel's assertion of attorney client privilege during this deposition, apparently in regard to Mr. Draper's communications with the prosecuting attorneys, prevented details from being fully disclosed), Aplt. App. at 574-85, 594-95, 654-55, 727-34, 748.

Mr. Draper also testified in this same deposition that Army statistician Cherise Day had discovered some logs had been altered, she may have had possession of both versions of those logs, and she certainly had an altered version of some logs which she showed to Draper; Draper himself confirmed the alteration of both copies of logs and log originals (which were locked in manager King's office after collection) that had been written over with pen to alter failing numbers to passing numbers by, for example changing a "3" to an "8"; Draper also observed some logs where the value recorded in the first challenge (P1) box logs was inconsistent with the comments made by the operator in the bottom comments section of the logs regarding failing challenges, and some logs were observed to have numbers altered in both the top (P1) section and the bottom (comments) section.

Aplt. App. at 569-99, 650-55, 659-60, 728-31, 734-37, 740-42, 747. Mr. Draper testified that he had no evidence that Mr. Yarbrough was responsible for the log alterations found, that CID Agent Pavlik to his knowledge also had no evidence that Mr. Yarbrough was responsible for the log falsifications found, and that he and Pavlik had no idea beyond mere suspicions who had altered the logs. Aplt. App. at 738, 743.

After the trial, new counsel Harrison requested in writing that the U.S. Attorney produce to Defendant various operator log pages in the Government's possession that were not previously produced, including pages from the Government's incomplete trial exhibits and alternate versions of the logs that were produced to the Defense and at trial. *See* Aplt. App. at 518-19. The U.S. Attorney refused to produce those logs.

Three years after his conviction, based on the new evidence he had discovered post-trial, Mr. Yarbrough filed a motion for new trial. Aplt. App. at 23-36. The newly discovered evidence was attached to Defendant Yarbrough's motion for new trial as exhibits A-S and EE, FF. Aplt. App. at 37-283, 520-783. Other relevant evidence that should be read together with the new evidence to understand its full significance was also presented as attachments to that motion. Aplt. App. at 284-519.

The new documentary evidence submitted by Defendant Yarbrough had been obtained after trial and after the denial of his first motion for new trial via efforts of his new counsel. These documents, which included computer recorded data from the chemical agent air

monitors in question (the "PDARS"), several strip charts which recorded the readings of the "ACAMS" chemical agent air monitors in question, two monitoring data compilations prepared for the Army Commander post-trial (the "Commander's Spreadsheet" and the "Commander's INACCMO"), and the deposition of Army monitoring manager Kevin Draper contained substantial evidence favorable to the Defense.

The newly discovered evidence shows a pattern of falsification of the chemical agent air monitoring test results by the making of physical alterations to operator log entries including by writing over failing numbers originally entered on logs in order to make the results appear to be passing, and recording false numbers on the logs. At least a substantial portion of this pattern was discovered by the Government pre-trial. Aplt. App. 569-99, 650-55, 659-60, 728-31, 734-37, 740-42, 747.

Station 569 is one of the stations forming the basis for count 8 in the indictment. Aplt. App. at 19-20. On the Station 569 operator's log, Aplt. App. at 337-38, presented by the Government at trial, there are passing values on the operator's log for July 16th, 17th and 20th but the Commander's Spreadsheet, Aplt. App. at 274, shows operator log values that were failing for each of these three dates. Upon close physical examination of the version of the operator's log for Station 569 put into evidence by the Government at trial (a magnifying glass is useful) prompted by the discovery of this discrepancy, it was apparent that each of the three log values in question had been written over to make failing entries noted in the Commander's Spreadsheet appear passing. Compare Station 569 values reported at Aplt. App. at 274, with same at Aplt. App. at 337-38.

The July 16th original failing entry of .31 was altered by writing over the 3 in the log to make it appear to be an 8, resulting in a false passing .81 entry in the log, Aplt. App. at 337, which also appears on Mr. Yarbrough's worksheet, Aplt. App. at 336. The July 17th original failing entry of .57 was altered by writing over the 5 in the log to make it appear to be an 8, resulting in a false passing .87 log entry, Aplt. App. at 337, which also appears on Mr. Yarbrough's worksheet, Aplt. App. at 336. The July 20th original failing entry of .68 was altered by marking out the 6 in the log and adding a 0 to the right of the 8 to make the number appear to be a false passing .80 log entry, Aplt. App. at 337, which also appears on Mr. Yarbrough's worksheets, Aplt. App. at 336. The strip charts for 569 were concealed or destroyed. Aplt. App. at 274 (Commander's Spreadsheet noting missing strip charts), 284-89 (Government Trial Exhibit List omitting these strip charts).

The PDARS data for Station 569 or other stations was not produced to the Defense by the Government or offered into evidence at trial. Had it not been for the post-trial disclosure by the Army of the Commander's Spreadsheet, Aplt. App. at 274, which summarized the operator log, PDARS and strip chart data available to the Commander at the time of the creation of this "spreadsheet" or data chart, the fact that the operator's log for Station 569 had been physically altered to falsify the data might never have been discovered.

The newly discovered evidence confirms that numerous failing ACAMS challenges in the CAMDS CTF baseline were falsified on the operator logs to appear to be passing. The ACAMS challenges in the

CTF baseline were the subject of 7 of the 8 counts of the superseding indictment. Aplt. App. at 14-20. This new evidence proves that the following CTF baseline operator log entries are false:

1) Station 713 for July 22nd: PDARS = 0.27, Aplt. App. at 227, false log P1 entry = 0.76, Aplt. App. at 350, and note false strip chart entry = 0.76, Aplt. App. at 265;

2) Station 713 for July 20th: strip chart = 1.35, Aplt. App. at 263; PDARS = 1.32, Aplt. App. at 226, false log P1 entry = 1.03, Aplt. App. at 349;

3) Station 713 for July 19th: strip chart = 1.33, Aplt. App. at 262, PDARS = 1.32, Aplt. App. at 226, false log P1 entry = 1.25, Aplt. App. at 349;

4) Station 712 for July 15th: strip chart = missing, Aplt. App. at 276, PDARS is in malfunction (negative reading), Aplt. App. at 221, false log P1 entry = 1.15, Aplt. App. at 346 (was 1.50, visibly altered), Note: Commander's Spreadsheet reports a log value of 1.50, Aplt. App. at 276;

5) Station 711 for July 22nd: strip chart = missing, Aplt. App. at 276, PDARS = 0.2, 2.92, 3.0, 1.22, Aplt. App. at 219, false log P1 entry = 1.24, Aplt. App. at 344;

6) Station 711 for July 20th: strip chart = missing, Aplt. App. at 276, PDARS = 0.6, Aplt. App. at 217, false log P1 entry = 0.78 noted in Commander's Spreadsheet, Aplt. App. at 276; the Government has not produced this log;

7) Station 570 for July 22nd: strip chart = 0.60, Aplt. App. at 251, PDARS = 0.57, Aplt. App. at 175, false log P1 entry = 0.78, Aplt. App. at 340;

8) Station 570 for July 21st: strip chart = 0.68, Aplt. App. at 250, PDARS = 0.67, Aplt. App. at 165, false log P1 entry = 0.80 noted in the Commander's Spreadsheet, Aplt. App. at 275; the Government did not produce this log;

9) Station 570 for July 19th: strip chart = 1.3, Aplt. App. at 247, PDARS = 1.3, Aplt. App. at 157, the Government did not produce this log, the Commander's Spreadsheet reports a log entry of 1.48, Aplt. App. at 275. Yarbrough had 1.18 on his worksheet. Aplt. App. at 339. The log was likely falsified to read a passing 1.18 by writing over the "3" in the original log value (matching the strip chart 1.3) to make an "8" and inserting a "1" to the left of the "3", as observed on other falsified stations, causing Yarbrough's worksheet entry of 1.18, and then, in an attempt to cover the falsification after the investigation commenced, the second "1" in the false 1.18 was altered by writing over to make the 1.48 shown on the Commander's spreadsheet;

10) Station 569 for July 23rd: strip chart = missing, Aplt. App. at 274, PDARS = 0.70, Aplt. App. at 137, false log P1 entry = 0.79, Aplt. App. at 338;

11) Station 569 for July 20th: strip chart = missing, Aplt. App. at 274, PDARS = 0.67, Aplt. App. at 135, false log P1 entry = 0.80, Aplt App. at 337, Note: The Commander's Spreadsheet reports a log entry of 0.68, Aplt. App. at 274;

12) Station 569 for July 17th: strip chart = missing, Aplt. App. at 274, PDARS = 0.55, Aplt. App. at 134, false log P1 entry = 0.87, Aplt. App. at 337, Note: The Commander's Spreadsheet reports a log entry of 0.57, Aplt. App. at 274;

13) Station 569 for July 16th: strip chart = missing, Aplt. App. at 274, PDARS = 0.3, Aplt. App. at 134, false log P1 entry = 0.81, Aplt. App. at 337, Note: The Commander's Spreadsheet reports a log entry of 0.31, Aplt. App. at 274;

14) Station 568 for July 20th: strip chart = 0.73, Aplt. App. at 238, PDARS = 0.72, Aplt. App. at 127, false log P1 entry = 0.77, Aplt. App. at 334;

15) Station 567 for July 21st: strip chart = missing, Aplt. App. at 274, PDARS = 0.57, Aplt. App. at 112, false log P1 entry = 0.81, Aplt. App. at 331;

16) Station 274 for July 21st: strip chart = 0.67 (written over), Aplt. App. at 233, PDARS = 0.6, Aplt. App. at 84, false log P1 entry = 0.99, Aplt. App. at 329;

17) Station 274 for July 20th: strip chart = 0.77, Aplt. App. at 232, PDARS = 0.67, Aplt. App. at 84, false log P1 entry = 0.82, Aplt. App. at 329;

18) Station 120 for July 20th: strip chart = missing, Aplt. App. at 277, PDARS = 0.57, Aplt. App. at 71, log has marked out .60, .78, 1.00 then late entry 0.67/1.09, Aplt. App. at 326; Note: This is another example of a falsified number altered back to a correct value as a coverup.

19) Station 120 for July 19th: strip chart = missing, Aplt. App. at 277, PDARS = 0.7, Aplt. App. at 69, false log P1 entry = 0.78, Aplt. App. at 326;

20) Station 26D for July 23rd: strip chart = 0.73, Aplt. App. at 462, PDARS = 0.72, Aplt. App. at 59, false log P1 entry = 0.75, Aplt. App. at 324;

21) Station 26D for July 19th: strip chart = 1.41, Aplt. App. at 458, PDARS = 1.40, Aplt. App. at 56, false log P1 entry = 1.7, Aplt. App. at 323; Note: Yarbrough's worksheet had an entry of 1.2, Aplt. App. at 321. Note: This example may involve an inadvertent misreading of a 1.7 as a 1.2. It is also possible that the 1.7 on the log was created in an after the fact attempt to hide a prior false log entry of 1.2 (by use of white out);

22) Station 26 for July 24th: strip chart 10Z = 7.25, Aplt. App. at 454(a), PDARS 10Z = 7.22, Aplt. App. at 53, log 10Z entry = false 7.85 (original 7.25 written over) marked out, then 7.25 again, Aplt. App. at 320; Yarbrough W.S. 10Z = 7.25 written over to be 7.85, Aplt. App. at 318 (the passing range for 10Z challenges is +/- 25% as for 1Z challenges, see Aplt. App. at 487, 503, 1017, which makes the acceptable 10Z range 7.5-12.5, whereas for 1Z challenges the range is 0.75-1.25);

23) Station 26 for July 22nd: strip chart = 0.54, Aplt. App. at 452, PDARS = 0.52, Aplt. App. at 52, log P1 entry = 0.84 marked out, then 0.54, Aplt. App. at 320.

In addition to these documented false entries, which include some indicted stations and dates, there are a number of additional ACAMS operator log entries which fit this log falsification pattern, including the additional Yarbrough worksheet data points that were subject to the superceding indictment, and which probably were falsified in the same manner. The most common method of log falsification was to write over the ten's digit (a value from 1-7) of a failing value to make an eight, leaving the one's digit unchanged. This would change a value below 0.75 (below the minimum required, i.e. failing) to a value above 0.75 (passing). If the failing value was in the range of .71-.74, the one's digit was sometimes written over to make a value 7 or larger. Due to key documentary evidence in the Government's control still, to this day, not having been produced by the Government, the following additional examples cannot be established with certainty as log falsifications, but are highly probable log falsifications:

1) Station 714 for July 16th: PDARS = NA, Aplt. App. at 276, Strip chart: missing, Aplt. App. at 276, Commander's Spreadsheet reports a log P1 entry = 0.64, Aplt. App. at 276, Yarbrough W.S. = 0.84, Aplt. App. at 351,; Note: The Government did not produce this log.

2) Station 711 for July 16th: PDARS = 0.65, Aplt. App. at 216, Strip chart: missing, Aplt. App. at 276, Commander's Spreadsheet reports a log P1 entry = 0.71, Aplt. App. at 276, Yarbrough W.S. = 0.76, Aplt. App. at 343; Note: The Government did not produce this log.

3) Station 703 for July 23rd: PDARS = 0.67/0.72, Aplt. App. at 197, Strip chart: missing, Aplt. App. at 275, log P1 entry = 0.72, Aplt. App. at 342, DJY W.S. = 0.78, Aplt. App. at 341;

4) Station 703 for July 22nd: PDARS = 0.40, Aplt. App. at 196, Strip chart: missing, Aplt. App. at 275, log P1 entry = 0.43, Aplt. App. at 342, DJY W.S. = 0.83, Aplt. App. at 341;

5) Station 703 for July 17th: PDARS = 0.55, Aplt. App. at 194, Strip chart: missing, Aplt. App. at 275, Commander's Spreadsheet reports a log P1 entry = 0.55, Aplt. App. at 275, DJY W.S. = 0.85, Aplt. App. at 341; the Government did not produce this log;

6) Station 703 for July 16th: PDARS = 0.32, Aplt. App. at 193, Strip chart: missing, Aplt. App. at 275, Commander's Spreadsheet reports a log P1 entry = 0.33, Aplt. App. at 275, DJY W.S. = 0.83, Aplt. App. at 341; the Government did not produce this log;

7) Station 570 for July 16th: PDARS = 0.52, Aplt. App. at 148, Strip chart: missing, Aplt. App. at 275, the Commander's Spreadsheet reports a log P1 entry = 0.53, Aplt. App. at 275, DJY W.S. = 0.83, Aplt. App. at 339; the Government did not produce this log;

8) Station 567 for July 20th: PDARS = 0.87, Aplt. App. at 110, Strip chart: missing, Aplt. App. at 274, log P1 entry = 0.73, Aplt. App. at 331, DJY W.S. = 0.78, Aplt. App. at 330; Note that this worksheet entry may have been an original 0.73 altered by writing over the "3", and as such may be better classified in the list of

proven falsifications given above; Also note that discovery would be expected to show the PDARS value in this case resulted from an improper calibration procedure;

9) Station 567 for July 19th: PDARS = 0.57, Aplt. App. at 105, Strip chart: missing, Aplt. App. at 274, log P1 entry = 0.74, Aplt. App. at 331, DJY W.S. = 0.79, Aplt. App. at 330;

10) Station 274 for July 24th: PDARS = 0.67, Aplt. App. at 85, Strip chart: 0.78, Aplt. App. at 236, log "missing," Aplt. App. at 276, Yarbrough W.S. = 0.78, Aplt. App. at 328;

11) Station 120 for July 21st: PDARS = 0.65, Aplt. App. at 72, Strip chart: missing, Aplt. App. at 277, log P1 entry = 0.67/1.09, Aplt. App. at 326, Yarbrough W.S. = 0.67/1.09, Aplt. App. at 325; Note: the log shows that the 1.09 was entered first and the 0.67 inserted later.

12) Station 120 for July 16th: PDARS = 0.25, Aplt. App. at 68, Strip chart: missing, Aplt. App. at 277, log P1 entry = 0.25, Aplt. App. at 326, Yarbrough W.S. = 0.85, Aplt. App. at 325; Note: The log comments section notes a later challenge of 0.85, Aplt. App. at 326.

13) Station 26D for July 17th: PDARS = 0.62, Aplt. App. at 56, Strip chart: missing, Aplt. App. at 274, log P1 entry = 0.66, Aplt. App. at 323, Yarbrough W.S. = 0.80, Aplt. App. at 321; Note: Failing values between .66 and .69 are difficult to falsify by writing over one digit without arousing suspicion because a .66 converted to a .86 by writing over the first 6, for example, would cause

the corrective action/preventative maintenance noted in the log comment section for the failing challenge to become a red flag (i.e. no such action is required or expected for any value greater than 0.85). This dilemma for the perpetrators caused visible marking out of digits for similar values in some of the documented examples above of falsified log entries. See, e.g., Station 569 log for July 20th where 0.68 became a (messy) 0.80, Aplt. App. at 337.

14) Station 26D for July 16th: PDARS = 0.35, Aplt. App. at 55, Strip chart: missing, Aplt. App. at 274, log P1 entry = 0.37, Aplt. App. at 323, Yarbrough W.S. = 0.81/0.87, Aplt. App. at 321; Note: Regarding the indicted numbers on station 26D, Cherise Day's notes indicate that she reviewed a log for station 26D and observed entries that concerned her enough to report them to her superiors. Aplt. App. at 379. This was probably the altered, not produced, version of the operator's log for station 26D. The one page of Grand Jury testimony produced by the Government, Aplt. App. at 517, suggests that this log alteration discovered by Ms. Day was falsely attributed to Mr. Yarbrough by the prosecutor by making use of Mr. Yarbrough's ill-advised statement to CID Agent Pavlik in the absence of his attorney, regarding a "change" he made to data on Station 26D, in which CID statement Mr. Yarbrough was referring to a different (and innocent) change on his worksheet for July 16th, see Aplt. App. at 321, not on a log. Agent Pavlik actually made clear on cross examination at trial that based on his interview with Mr. Yarbrough, the only "change" or "alteration" of data Mr. Yarbrough discussed having made, and the only change or alteration of data Pavlik accused Yarbrough of making,

was in regard to Yarbrough's decision to use different challenge numbers on Yarbrough's worksheets than appeared on the logs. Aplt. App. at 1248-49. Pavlik acknowledged that this limitation and definition of terms applied to any alleged change of data Yarbrough made in regard to Station 26D as well. *Id.*

15) Station 26 for July 20th: PDARS = 0.65, Aplt. App. at 51, Strip chart: 0.68, Aplt. App. at 274 (Note: this strip chart value is reported in the Commander's Spreadsheet), log P1 entry = 0.68, Aplt. App. at 319 (indications of white-out use), Yarbrough W.S. = 0.80, Aplt. App. at 318; Note: This is another probable example of a messy alteration of an initial failing value between 0.66 and 0.69, with the altered version of log not produced, and/or use of white-out.

16) Station 26 for July 18th: PDARS = 0.67, Aplt. App. at 50-51, Strip chart: missing, Aplt. App. at 274, log P1 entry = 0.70, Aplt. App. at 319, DJY W.S. = 0.80, Aplt. App. at 318.

The superseding indictment had eight counts, seven of which concerned the CTF baseline tests. The false and suspect data just presented above was from the CTF baseline tests. In the remaining count of the superseding indictment, Mr. Yarbrough was accused of making similar false statements regarding another baseline test at CAMDS, the "Filter Farm" baseline. Aplt. App. at 18-19 (Count 7). There is also evidence that the filter farm baseline was subject to log falsifications. For the Filter Farm baseline, Defendant can establish false log entries on station 411 for July 6 (.35 on strip chart, .32 on PDARS, but the log entry is

1.19, all data reported in manager Draper's worksheets, Aplt. App. at 355, Trial Exhibit 31); Station 431 for July 6 (strip chart reports 0.53 as first challenge, PDARS shows 0.52, but log entry is 0.81, Aplt. App. at 356); Station 431 for July 5 (strip chart shows 0.51 as first challenge, PDARS reports 0.65, but log value is 0.83, Aplt. App. at 356); Station 431 for July 4 (PDARS shows .50, but the log shows .89, Aplt. App. at 356); Station 546 for July 4 (strip chart shows 0.59, PDARS shows 0.52, but log shows 1.06, Aplt. App. at 357); Station 551 for June 29 (log comment reports first challenge of 0.70, Aplt. App. at 306, but log P1 entry is an ambiguous 0.78, Aplt. App. at 306); and Station 551 for June 30 (showing log entries in both top P1 and bottom comments sections that appear altered then altered back, Aplt. App. at 306). This list is non-exhaustive list. Discovery and witness examination at a hearing would be expected to generate a longer list of such examples.

Station 550 in the Filter Farm baseline was the focus of count 7 in the superceding indictment. However, the operator log page for Station 550 for June 29 through July 3 was not produced by the Government or offered at trial. See Aplt. App. at 284, 303 (Government Trial Exhibit List and Exhibit for Station 550 log). The available data for this Station fits the pattern of falsification otherwise documented. For Station 550 on July 2nd the strip chart first challenge value in Army manager Draper's notes, Aplt. App. at 304, 353, Government Trial Exhibits 9B and 31, is .37, but Mr. Yarbrough's worksheet shows 0.96. However, the only PDARS computer recorded value reported by Draper is 0.96, Aplt. App. at 353, which matches Yarbrough's worksheet. Draper reports no log sheet

value for this date. *Id.* The log page withheld by the Government is expected to falsely show 0.96 as the first challenge result, explaining Yarbrough's 0.96.

It is undisputed, and apparent from the Government's trial exhibits, that the Government failed to offer at trial **any** version of the log sheets for July 15-July 21 for stations 570, 703, 711, and 714; the log sheets for the later portion of the CTF baseline, July 22nd - July 24th, for stations 274 and 714; and log sheets for the first part of the FF baseline for stations 431 and 550. These logs were never produced to the Defense. Defendant requested these logs post-trial, but was refused by the Government. Aplt. App. at 518-19. The newly discovered evidence shows that some and possibly all of these log pages contain false entries and likely show visible evidence of tampering which would have been apparent to the Defense and the jury. For example, the log entry for station 570 for July 21st was 0.80 as reported on the Commander's spreadsheet, Aplt. App. at __, Exhibit R, but the challenge result recorded on the strip chart was reported as .68. Aplt. App. at 275. The log entry for station 711 for July 20th was 0.78 as reported on the Commander's spreadsheet, Aplt. App. at 276, but the PDARS computer data is reported as showing a challenge result of 0.60, Aplt. App. at 276. Army procedures require the PDARS recorded value to be within 0.05 of the actual ACAMS reading. Aplt. App. at 503.

The newly discovered evidence shows the pattern of numbers on the operator logs, as reported on the Commander's spreadsheet, compared to Mr. Yarbrough's worksheets for Stations 703 and 714

match the pattern of log falsification documented above. On station 703, e.g., the first challenge (P1) log entry reported on the Commander's spreadsheet for July 16th is 0.33. Aplt. App. at 275. Mr. Yarbrough's worksheet shows a 0.83. Aplt. App. at 341. For station 703 the log entry on the Commander's spreadsheet for July 17th is 0.55, Aplt. App. at 275, and Mr. Yarbrough's worksheet shows a 0.85, Aplt. App. at 341. This data matches the expected pattern based on the other examples of log falsification now documented – the writing over of a failing number often by making a lower value appear to be an "8" to create the appearance of a passing number. It is likely that these withheld log sheets again show visible evidence that the logs had been tampered with, which log tampering caused Mr. Yarbrough's worksheets to contain false numbers. As another example, for CTF station 274 for July 24th the strip chart value on the Commander's spreadsheet was .78, Aplt. App. at 276, but the PDARS shows .675, Aplt. App. at 276. Thus, this strip chart entry is apparently false and the missing log would likely reflect this false value as well.

The newly discovered evidence points to additional likely log falsifications on logs suppressed by the Government. For Filter Farm (FF) station 431 for June 29th, the strip chart value in trial Exhibit 31, Aplt. App. at 356, was 0.65 for the first challenge, a failing value, and 0.79 for a later passing challenge. The only PDARS value reported by manager Draper in Trial Exhibit 31 was 0.80. Aplt. App. at 356. Mr. Yarbrough's worksheet entry was 0.79. Aplt. App. at 293. The log page not produced by the Government may reflect a 0.79 value matching Mr. Yarbrough's worksheet, even though

that value will be false in that it is not the first challenge value. For FF station 550 for July 2d, the strip chart first challenge value in Trial Exhibit 31 was 0.37, with a later challenge value reported as 0.96. Aplt. App. at 353. Draper's reported PDARS value was 0.96 only. *Id.* Yarbrough's worksheet reflected the PDARS value of 0.96. Aplt. App. at 301. It is likely that the log page not produced by the Government reflects the false 0.96 value.

The newly discovered two data compilations prepared for the Army Commander, the Commander's Spreadsheet, Aplt. App. at 274-77, and the Commander's INACCMO, Aplt. App. at 278-83, as well as the PDARS data and Kevin Draper's 2005 deposition testimony, establish with certainty that significant evidence favorable to the Defense exists, or existed, such as two versions of the ACAMS operator logs, and Draper's report of his findings regarding, *inter alia*, ACAMS operator log falsifications during the baseline tests in question which he submitted to Army officials and the Government investigator, CID Agent Pavlik, and apparently to the federal prosecutors (see record cites *supra*), that was not produced to the Defense, and the existence of which was not disclosed to the Defense.

Cherise Day obtained the first seven days, July 15-July 21, of the operator logs for the July, 2002 CTF baseline and input this data into her computer. *See* Aplt. App. at 513. Her initial INACCMO run using seven days of log data and the last three of ten days of data from Yarbrough's worksheets proves that she had the yet-to-be-altered log sheets at that time. *See* Aplt. App. at 352, Government Exhibit 30, (reporting 5 failing low log

P1 values for station 569 in the "NUMLO" column, compared to the altered version of that log produced by the Government at trial, Aplt. App. at 337-38, which shows only 2 failing low challenges). Thus, Ms. Day, Mr. Pavlik, Mr. Draper, and apparently the U.S. Attorney had access to the unaltered versions of logs but produced at trial only the altered version of some, such as 569 and 570. Ms. Day's statement to agent Pavlik reflects that the log sheets she had were given to Government investigator Pavlik, Aplt. App. at 514-15. The Commander's spreadsheet, Aplt. App. at 274-77, also shows that the Army had these log sheets because it reports specific yet-to-be-altered failing log entry values for Station 569.

Additional evidence of the existence of both altered and unaltered log versions, and the fact that the Government possessed both is seen in the evidence regarding Station 712. The Station 712 operator log version produced to the Defense and offered as Government Trial Exhibit 24A,B, Aplt. App. at 346-47, shows a passing first hazard challenge entry of 1.15 for July 15th. It is possible to confirm that the 1.15 is a false log entry because the log value reported on the Commander's spreadsheet, Aplt. App. at 276, is a failing 1.50, and a visual inspection of Trial Exhibit 24A, Aplt. App. at 346, shows the original 1.50 was physically altered by marking out the zero and squeezing in a one before the five. Mr. Yarbrough's worksheet, Aplt. App. at 345, Government Trial Exhibit 24, reflects the false 1.15 log entry, again as one would expect given the false log.

If the two Commander's data compilations, the Commander's Spreadsheet and the Commander's INACCMO were prepared after trial, then the Government must have had the unaltered (yet to be altered) versions of the logs for Stations 569 and 570, data from which was used in these two Commander's data compilations, but failed to disclose those to the Defense prior to or at trial. On the other hand, if these two Commander's data compilations were prepared prior to trial, then these data compilations themselves are examples of favorable evidence the Government failed to disclose to the Defense.

REASONS FOR GRANTING THE PETITION

A. A UNITED STATES COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW IN A WAY THAT CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT AND OTHER CIRCUITS REGARDING WHEN THE CONSTITUTION REQUIRES THAT A NEW TRIAL BE GRANTED TO A CRIMINAL DEFENDANT WHEN THE GOVERNMENT HAS USED FALSE EVIDENCE TO OBTAIN HIS CONVICTION

The Court of Appeals below focused on two aspects of the case, 1) the Court's perception that most of the evidence Yarbrough claimed was newly discovered was in some form available at trial, and 2) the sufficiency for a conviction of the other evidence produced by the Government at trial, such as Mr. Yarbrough's statements, which were construed as admissions, as discussed *infra*, and portions of the testimony of CID

Agency Pavlik (ignoring the fact that Mr. Draper's deposition showed that Agent Pavlik gave material false testimony. The post trial deposition of Kevin Draper establishes that Agent Pavlik gave false testimony at the trial when he denied knowledge of any falsification of the operator logs because Draper had presented him with the results of Draper's investigation showing a pattern of log falsifications.

The Court of Appeals found it significant that several examples of altered log entries were discussed at trial but failed to note that at no time during the trial was Kevin Draper's investigation findings of a pattern of log falsifications disclosed, at no time was Kevin Draper's written report produced to the defense or offered into evidence, and at no time did a single witness or a Government lawyer admit to "falsification" of the logs, not even in isolated examples let alone the pattern that Draper had uncovered and reported to Agency Pavlik. The Court of Appeals failed to note that Agent Pavlik disclaimed any knowledge of log falsifications or that Pavlik had been informed of this pattern of falsification by Draper himself.

The Court of Appeals concluded that the Constitution would not require a new trial notwithstanding the Government's knowing use of false evidence in Mr. Yarbrough's trial because either: 1) Mr. Yarbrough's trial counsel should have discovered the use of the false evidence based on the exhibits and testimony presented at trial; or 2) Sufficient evidence remained to support a conviction after discounting the false evidence. Neither of these two rationales comports with the law as stated by the Supreme Court.

The Supreme Court has clearly articulated the standard to be applied in cases where a defendant seeks a new trial based upon the Government's use of false evidence. In *United States v. Agurs*, 427 U.S. 97 (1976), the Court held that "a conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *Agurs*, 427 U.S. at 103 (footnote omitted).

The Court in *Agurs* further stated that the prosecutor is "the 'servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer.'" 427 U.S., at 111 (*quoting Berger v. United States*, 295 U.S. 78, 88 (1935)). The Court in *Agurs* stated that holding the prosecution to a higher standard is necessary because of the "special significance" of "the prosecutor's obligation to serve the cause of justice." *Agurs*, 427 U.S., at 111. In *Napue v. Illinois*, 360 U.S. 264 (1959), the Court noted that a conviction obtained by the Government's knowing use of false testimony cannot stand. Prosecuting attorneys have a duty not to argue false or inadmissible evidence to the jury. *Miller v. Pate*, 386 U.S. 1 (1967). Likewise, Prosecuting Attorneys have a duty to correct false evidence when it is offered. *Napue v. Illinois*, 360 U.S. 264, 269 (1959).

> As previously indicated, our own evaluation of the record here compels us to hold that the false testimony used by the State in securing the conviction of petitioner may have had an effect on the outcome of the trial.

> Accordingly, the judgment below must be Reversed.

Napue v. Illinois, 360 U.S. 264, 265-72 (1959). *Also see, Brown v. Borg*, 951 F.2d 1011 (9th Cir. 1991); *Larrison v. United States*, 24 F.2d 82 (7th Cir. 1928). The rule applied by the Tenth Circuit here clearly conflicts with the decisions of two other circuits. *See, Brown v. Borg*, 951 F.2d 1011 (9th Cir. 1991); *Larrison v. United States*, 24 F.2d 82 (7th Cir. 1928).

The Court of Appeals failed to perform the required analysis to determine whether, notwithstanding the issue of whether sufficient evidence remained that could have supported a conviction, the withheld and newly discovered evidence of a pattern of intentional operator log falsifications that could explain the incorrect numbers on Yarbrough's worksheets for which he was indicted placed the case in such a new light that there was a reasonable likelihood that the judgment of the jury could have been affected. Critical in regard to this failure was the Court of Appeal's failure to even acknowledge that the Jury acquitted Yarbrough on the one count for which the jury was presented with clear testimony that a log entry had been altered.

For these reasons, the Supreme Court should grant Mr. Yarbrough's Petition for a Writ of Certiorari and clarify the applicable law for the nation's courts on this important constitutional question, and to resolve the differing interpretations on this issue reflected in the various circuits.

B. A UNITED STATES COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW IN A WAY THAT CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT AND OTHER CIRCUITS REGARDING WHEN THE CONSTITUTION REQUIRES THAT A NEW TRIAL BE GRANTED TO A CRIMINAL DEFENDANT WHEN THE GOVERNMENT HAS FAILED TO DISCLOSE EVIDENCE FAVORABLE TO THE DEFENSE INCLUDING EVIDENCE RELATING TO THE GOVERNMENT'S USE OF FALSE EVIDENCE TO OBTAIN HIS CONVICTION

As discussed *supra*, the Court of Appeals improperly focused on what evidence would have remained to support a conviction after discounting any evidence impeached by the withheld favorable evidence but the Court of Appeals did not analyze the critical question under the standard stated by the Supreme Court:

> *Bagley's* touchstone of materiality is a "reasonable probability" of a different result, and the adjective is important. The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A "reasonable probability" of a different result is accordingly shown when the Government's evidentiary suppression

> "undermines confidence in the outcome of the trial." *Bagley*, 473 U. S., at 678.
>
> The second aspect of *Bagley* materiality bearing emphasis here is that it is not a sufficiency of evidence test. A defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict. The possibility of an acquittal on a criminal charge does not imply an insufficient evidentiary basis to convict. One does not show a *Brady* violation by demonstrating that some of the inculpatory evidence should have been excluded, but by showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict. [footnote omitted]

Kyles v. Whitley, 514 U.S. 419 (1995). The Court of Appeals failed to apply this standard and focused in error on the sufficiency of the residual evidence.

For these reasons, the Supreme Court should grant Mr. Yarbrough's Petition for a Writ of Certiorari and clarify the applicable law for the nation's courts on this important constitutional question.

CONCLUSION

For the all the foregoing reasons, Petitioner David Yarbrough respectfully requests that the Supreme Court of the United States grant his Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT FILED JANUARY 14, 2008

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 06-4301

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

DAVID JAMES YARBROUGH,

Defendant - Appellant.

261 Fed. Appx. 80; 2008 U.S. App. LEXIS 981

January 14, 2008, Filed

JUDGES: Before KELLY, ANDERSON, and TYMKOVICH, Circuit Judges.

OPINION BY: Paul J. Kelly, Jr.

OPINION

Appendix A

ORDER AND JUDGMENT*

Defendant-Appellant David Yarbrough appeals from the district court's denial of his second motion for a new trial and request for discovery and an evidentiary hearing. We exercise jurisdiction pursuant to *28 U.S.C. § 1291*, and we affirm.

Background

Mr. Yarbrough was indicted in a superceding indictment on eight counts of making false statements to the government in violation of *18 U.S.C. § 1001* and *§ 2(b)*. On July 30, 2003, Mr. Yarbrough was found guilty on seven counts and acquitted on count 5. Following the jury verdict, he filed a motion for a new trial. The district court denied his motion and sentenced him to six months' imprisonment, to be followed by three years' supervised release. Mr. Yarbrough appealed the district court's denial of his motion for a new trial, and we affirmed the district court's decision. *United States v. Yarbrough, 137 F. App'x 147 (10th Cir. 2005)* (unpublished).

We described the facts underlying Mr. Yarbrough's case in detail in our previous disposition, *see id. at 149-53*; thus, we only provide a summary here. Mr. Yarbrough worked as the division chief for the monitoring division

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with *Fed. R. App. P. 32.1* and *10th Cir. R. 32.1*.

at the Deseret Chemical Depot (Depot) near Tooele, Utah. He supervised technicians who maintained various air-monitoring systems as part of the Depot's program of destroying chemical weapons. The technicians maintain an automated continuous air monitoring system (ACAMS), comprised of a series of machines or units, that continuously monitor the air released from the test facilities for any trace of toxic chemicals. Technicians continuously test the ACAMS units by injecting the unit with a dose of a toxic chemical to ensure the accuracy and reliability of their operation. Technicians record the data from those challenges in three ways. First, the technicians record the results of their challenges on log sheets kept with each ACAMS unit. Second, the units themselves record the results on a strip of paper known as a strip chart which serve as a backup corroborating the log readings. Third, a computer records the data from all the ACAMS units. Every four weeks, a report, known as an INACCMO report, is prepared for the Depot's supervisors as well as various regulatory and military agencies.

The government's theory at trial was that Mr. Yarbrough recorded data from the ACAMS on his personal worksheets that differed from the log sheets. The motive was to make it appear that baseline tests of certain units were passing. At trial, Mr. Yarbrough admitted that he directed a statistician to use the data from his worksheets to create the INACCMO report. Aplt. App. at 1373-74. Anthony Pavlik, the investigator, testified that Mr. Yarbrough admitted to changing the data to make it appear that a unit (station 26D) passed

when it had failed. *Id.* at 1232-35. When Mr. Pavlik asked about another unit, Mr. Yarbrough stated "since I admitted to the one, what's the point in going through all of them?" *Id.* at 1235. Mr. Yarbrough was convicted on seven counts for making the false statements and for causing these false statements to be included in two INACCMO reports. Mr. Yarborough defended on the basis that the operational logs were designed for a continuous baseline test and that it was unnecessary to consider failing data on a recertification baseline test. *Id.* at 1333-37, 1364, 1366-67.

Following his prior appeal, Mr. Yarbrough filed a second motion for a new trial based on newly-discovered evidence and requested discovery and an evidentiary hearing. The following documents, which the government produced following trial, is the evidence which forms the basis of Mr. Yarbrough's motion: computer recorded data (the "PDARS"), several strip charts which recorded the readings of the "ACAMS" air monitors, and two monitoring data compilations prepared for the Depot Commander ("the Commander's Spreadsheet"). In his motion, Mr. Yarbrough argued that these documents show that the government possesses two versions of the logs, altered and unaltered, and that the grand jury must have been shown the unaltered logs. The district court heard argument on the motion and in an oral ruling followed by a summary order denied Mr. Yarbrough's motion for a new trial and request for discovery and an evidentiary hearing.

Appendix A

On appeal, Mr. Yarbrough claims that he is entitled to (1) discovery and an evidentiary hearing on his motion for a new trial; (2) a new trial based on newly discovered evidence favorable to him and not disclosed; (3) a new trial based on newly discovered evidence that his conviction was obtained with false evidence; and (4) dismissal of the superseding indictment because false evidence was presented to the grand jury and was materially different from evidence at trial.

Discussion

A district court may grant a new trial in "the interest of justice." *Fed. R. Crim. P. 33*. To establish a violation under *Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963)*, warranting a new trial, "a defendant must demonstrate that (1) the prosecution suppressed evidence, (2) the evidence was favorable to the defendant, and (3) the evidence was material." *United States v. Combs, 267 F.3d 1167, 1172 (10th Cir. 2001)* (citations omitted). We review de novo the district court's denial of Mr. Yarbrough's *Rule 33* motion because it alleges a *Brady* violation. *United States v. Pearl, 324 F.3d 1210. 1215 (10th Cir. 2003)*. A prosecutor who knowingly presents false evidence violates due process, regardless of whether the evidence is relevant to substantive issues or to witness credibility. *Napue v. Illinois, 360 U.S. 264, 269, 79 S. Ct. 1173, 3 L. Ed. 2d 1217 (1959)*. In order to establish a due process violation, a defendant must show that (1) the evidence was in fact false, (2) the prosecution knew it to be false, and (3) the evidence was material. *United States v. Caballero, 277*

F.3d 1235, 1243 (10th Cir. 2002). We review the district court's rejection of this theory de novo. *Foster v. Ward, 182 F.3d 1177, 1192 (10th Cir. 1999)*. Finally, we review the denial of an evidentiary hearing for an abuse of discretion. *United States v. Smith, 413 F.3d 1253, 1282 (10th Cir. 2005)*.

We have carefully reviewed the "newly discovered evidence" against a backdrop of what occurred at trial. Substantially all of the evidence Mr. Yarbrough claims is newly discovered was disclosed to him and available at trial. Even assuming some was not available, he has not established that the "newly discovered evidence" is material, i.e., a reasonable probability that the outcome would have been different had the evidence been disclosed. *See United States v. Robinson, 39 F.3d 1115, 1118 (10th Cir. 1994)*. His defense at trial was that first-shot failures need not be recorded as part of recertification. His current defense is that he merely reported data from the log sheets that others had falsified. The evidence to present this defense is not new or is simply in a different format, i.e., on the annotated copies of Mr. Yarbrough's worksheets which Kevin Draper produced as part of his investigation. Aplt. App. at 353-75. Regardless, at trial, many witnesses testified, on both direct and cross examination, regarding alterations in the log sheets. *See, e.g., id.* at 1149-52, 1159-61, 1165-66, 1190-92, 1204-05. Merely because prior data has been compiled in a different form or marshaled for a different theory (a theory that obviously cuts both ways and would meet strong resistance given the extant testimony) does not warrant a new trial.

Im addition, most of the new evidence is not material becauıse Mr. Yarbrough was charged with providing inaccıurate data recorded on his worksheets to be incorporated into the INACCMO reports. Thus, the "newlly discovered evidence" does not somehow vitiate, let alone undermine, the substantial evidence upon which he was convicted at trial. In that regard, Mr. Yarbrough has always been in the best position to know what happened, and we have the investigator's testimony that Mr. Yarbrough admitted to falsifying data, *id.* at 1232-35, the signed statement admitting he altered the data so the baseline would pass, *id.* at 1241, 1383, and the cross examination of Mr. Yarbrough where he admitted to giving data to Ms. Day that omitted first-shot failures and differed from the log sheets, *id.* at 1373. Suffice it to say that Mr. Yarbrough has not met his burden under any of his theories warranting a new trial or discovery and an evidentiary hearing.

AFFIRMED.

Entered for the Court

Paul J. Kelly, Jr.

Circuit Judge

APPENDIX B — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT DENYING PETITION FOR REHEARING FILED MARCH 25, 2008

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 06-4301

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

DAVID JAMES YARBROUGH,

Defendant - Appellant.

ORDER

Before **KELLY, ANDERSON,** and **TYMKOVICH,** Circuit Judges.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Appendix B

Entered for the Court,

s/ Elisabeth A. Shumaker
ELISABETH A. SHUMAKER, Clerk